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No. 95-599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ILLINOIS CENTRAL RAILROAD,

Petitioner,

v.

STEVE DeBIASIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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Respondent raises four issues, none of which addresses the question presented for review by petitioner. Respondent makes no attempt in his opposition to dispute petitioner's contention that impact speed is an operational circumstance similar to closed knuckles or misaligned drawbars. The logic applied in this Court's decision in *Affolder v. New York, Chicago and St. Louis R.R.*, 339 U.S. 96 (1950), supports petitioner's contention that impact speed is an available defense to a cause of action under the federal Safety Appliance Act ("SAA"). Had the Seventh Circuit properly viewed impact speed as an operational circumstance giving rise to a "good defense" to a claim under the SAA, then the district court's error in barring defense counsel from adducing evidence that the knuckle

thrower, which respondent's own expert witness had described as non-defective, had been retrieved from the rail car in question could never have been considered harmless. When a failure to couple is due to the operational circumstance of impact speed and not due to any defect in the equipment involved, the non-defective nature of the coupling evidence is properly a defense to a claim under the SAA. This petition falls squarely within the scope of this Court's review in *Hiles v. Norfolk & Western Ry. Co.*, No. 95-6, October Term, 1995. Respondent makes no effort in his opposition to dispute petitioner's contention that a substantial conflict exists among state and federal courts over the interpretation of available defenses to a claim brought under the SAA, the issue common to both this petition and *Hiles*.

Contrary to respondent's argument in opposition, petitioner *did* raise the legal defense of impact speed at the district court level and in its briefs in the Court of Appeals. (R. 463-464, Petitioner's Brief to Seventh Circuit at pp. 12-13, 25-26.) Petitioner moved for judgment as a matter of law on respondent's SAA claim. One of the bases for which petitioner moved for judgment as a matter of law was on the ground that the coupler was non-defective and that the failure to couple was due to impact speed. (R. 463-464.) Petitioner specifically cited evidence regarding impact speed in its briefs before the Seventh Circuit. (Petitioner's Brief to Seventh Circuit at pp. 12-13, 25-26.) The Seventh Circuit never addressed the issue of impact speed in its decision but, rather, held as a matter of law that the only two defenses available to a defendant-railroad in an SAA claim are the operational circumstances of misaligned drawbars and closed knuckles. The Seventh Circuit's harmless error ruling was expressly predicated upon its erroneous ruling that the non-defective

nature of a coupler is pertinent only where there is evidence of a closed knuckle or a misaligned drawbar. *DeBiasio v. Illinois Central R.R.*, slip op. No. 94-3000 (7th Cir. 1995) (Petitioner's Appendix at 13a).

Respondent also argues that the exclusion of the knuckle thrower, which would have established that the coupler was not defective in the manner claimed by respondent's experts, was harmless "when other undisputed evidence conclusively established a violation of the Safety Appliance Act." To this end, respondent relies entirely upon the fact that a failed coupling occurred and therefore specific evidence of defect was not necessary. This argument, of course, begs the question of whether impact speed is an available defense under the Safety Appliance Act. The logic of this Court's holding in *Affolder* that the operational circumstance of not properly setting the couplers provided the railroad with a "good defense" to a claim under the SAA, seemingly applies to other operational circumstances such as misaligned drawbars and impact speed. In fact, two circuits have so interpreted *Affolder* to apply to misaligned drawbars. *See Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570, 575 (6th Cir. 1994); *Reed v. Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 132 (3d Cir. 1991).

If impact speed is an available defense, then petitioner was entitled to introduce evidence of the non-defective nature of its equipment. Respondent's experts limited their opinions regarding a violation of the SAA to the sole theory that the knuckle thrower "had to be broken," notwithstanding that they never examined the subject coupler (R. 276, 408.) The foundational evidence regarding Exhibit 33, which was improperly barred by the trial court, would have proven that the knuckle thrower was not broken in the only manner suggested by respondent's experts. Indeed,

respondent's own expert witness conceded that Exhibit 33 was not defective. *DeBiasio v. Illinois Central R.R.*, slip op. No. 94-3000 (7th Cir. 1995) (Petitioner's Appendix at 11a). Had the impeachment been allowed, respondent's own expert witness would have admitted that the coupler in question was non-defective. If impact speed is an available defense, such evidence should have been allowed. Respondent's opposition is silent as to why impact speed should not be considered an available defense similar to misaligned drawbars or closed knuckles.

Finally, respondent suggests that should this Court grant petitioner's petition for a writ of certiorari, its opinion would be merely an advisory opinion. Such is not the case. Respondent was improperly allowed to recover under an equipment statute, the SAA, for an incident involving non-defective equipment. This Court in *Affolder* and later circuit courts in *Kavorkian* and *Reed* have found that operational circumstances similar to impact speed, specifically, closed knuckles and misaligned drawbars, do not give rise to strict liability under the SAA, an equipment safety statute. Respondent's own expert conceded "I wouldn't be here today, no sir, nor would he have been injured" had the knuckle thrower not been broken in the manner that he had testified to at trial. (R. 229.) Had the evidence been allowed, petitioner would have been entitled to judgment as a matter of law as to respondent's SAA claim based on respondent's expert's admission that the knuckle thrower was not broken. The impeachment evidence would have refuted respondent's only theory under the SAA. Due to the trial court's erroneous ruling, the jury was not allowed to consider the non-defective nature of the equipment, and therefore petitioner was denied the right to present a defense it had available to it under the SAA. Instead, based on the trial court's error, the jury

was instructed under the SAA that plaintiff's comparative negligence was not a defense. Accordingly, the jury found no comparative fault on behalf of respondent. This erroneous finding of no comparative fault was based on jury instructions regarding respondent's SAA claim. The instructions regarding respondent's SAA claim certainly impacted on the jury's verdict regarding respondent's FELA claim. The trial court's error on a key piece of evidence pertaining to respondent's SAA claim directly resulted in an inflated FELA award for respondent.

The central issue to the present petition before this Court is whether impact speed is an operational circumstance similar to misaligned drawbars or closed knuckles which allows for a "good defense" to a cause of action under the SAA. This issue is similar to the issue before this Court in *Hiles*. Pursuant to this Court's holding in *Affolder*, petitioner submits that such a defense did exist in this case and therefore, petitioner was entitled to present evidence in this case regarding the non-defective condition of the equipment. The Seventh Circuit agreed that the trial court committed error in excluding such evidence. However, the Seventh Circuit failed to recognize impact speed as an operational circumstance defense to a claim under the SAA and therefore, the Seventh Circuit concluded that such error was harmless. The Seventh Circuit's decision was inconsistent with this Court's interpretation of the SAA. Moreover, the Seventh Circuit's decision is inconsistent with other federal circuits which have recognized other operational circumstances as defenses to a SAA claim.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and this Court should withhold its decision until it has ruled in *Hiles v. Norfolk & Western Ry. Co.*, No. 95-6, October Term, 1995.

Respectfully submitted,

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